



**U.S. Citizenship  
and Immigration  
Services**

**Non-Precedent Decision of the  
Administrative Appeals Office**

MATTER OF G-P-&A-, INC.

DATE: JUNE 30, 2016

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a naval architecture firm, seeks to employ the Beneficiary as a senior mechanical engineer, Latin America projects. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director, Nebraska Service Center, denied the petition. The Director determined that the Petitioner had not established its ability to pay the proffered wage from the priority date onwards. On February 4, 2016, we affirmed the Director's decision and dismissed the appeal.

The matter is now before us on a motion to reopen and motion to reconsider. The Petitioner claims that it has established it had the ability to pay the proffered wage through its net current assets or the totality of the circumstances for its business. We will deny the motion to reopen and motion to reconsider.

**I. LAW AND ANALYSIS**

The regulation at 8 C.F.R. § 103.5(a)(2) states that "[a] motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence." The regulation at 8 C.F.R. § 103.5(a) provides, that "[a] motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision."

On motion, the Petitioner asserts that we incorrectly determined that it did not have the ability to pay the proffered wage through payment of wages to the Beneficiary, its net income and net current assets, or through the totality of its circumstances. The Petitioner submits additional evidence in support of this assertion.

The instant petition is accompanied by an approved ETA Form 9089, Application for Permanent Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is July 24, 2014. *See* 8 C.F.R. § 204.5(d).

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In determining the petitioner's ability to pay the proffered wage during a given period, U.S. Citizenship and Immigration Services (USCIS) examines: (1) wages paid to the beneficiary; (2) the petitioner's net income; (3) the petitioner's net current assets; and (4) the totality of the circumstances of the petitioner's business. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).<sup>1</sup> Where a petitioner has filed multiple petitions, we will also consider the petitioner's ability to pay the combined wages of each beneficiary. *See Patel v. Johnson*, 2 F.Supp.3d 108 (D. Mass. 2014); *see also Great Wall* at 144-145.

The issue before us is whether the Petitioner established that it has the ability to pay the proffered wage of \$84,937 from the July 24, 2014, priority date onwards.

#### A. Total Proffered Wages

In our previous decision we noted that the record of proceedings reflected that the Petitioner paid the Beneficiary less than the proffered wage in both 2014 and 2015 and that USCIS records identified at least one additional beneficiary.

On motion, the Petitioner provides information reflecting that the proffered wage to the other beneficiary is \$99,528. The Petitioner must, therefore, establish that it had the ability to pay total proffered wages of \$184,465 in both 2014 and 2015.

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<sup>1</sup> Federal courts have upheld our method of determining a petitioner's ability to pay. *See River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Tongatapu Woodcraft Haw., Ltd v. Feldman*, 736 F.2d 1305, 1309 (9th Cir. 1984); *Estrada-Hernandez v. Holder*, 108 F. Supp. 3d 936, 942-43 (S.D. Cal. 2015); *Rivzi v. Dep't of Homeland Sec.*, 37 F. Supp. 3d 870, 883-84 (S.D. Tex. 2014), *aff'd*, -- Fed. Appx. --, 2015 WL 5711445, \*1 (5th Cir. Sept. 30, 2015).

## B. Wages Paid

On motion, the Petitioner submits a 2015 IRS Form W-2, Wage and Tax Statement, issued to the Beneficiary. The Petitioner requests that we add the amounts in box 12a (voluntary pre-tax retirement deductions) and box 5 (Medicare wages and tips) to calculate the gross wages paid to the Beneficiary. However, the amount in box 5 already includes the pre-tax deduction taken by the Beneficiary in box 12a. Therefore, we find that the Petitioner paid the Beneficiary gross wages of \$76,513.59 in 2014 and \$76,410.66 in 2015. The Petitioner must establish that it had the ability to pay the difference between the proffered wage and the actual wages paid to the instant Beneficiary (\$8,423.41 and \$8,526.34) in 2014 and 2015.

Additionally, the Petitioner must establish that it had the ability to pay the total proffered wages of \$99,528 to the beneficiary of its other Form I-140 in 2014 and 2015. On motion, the Petitioner claims that it paid the full proffered wage to the other beneficiary in 2015. However, the Petitioner does not submit IRS Forms W-2 or 1099, paystubs or payroll records for the other beneficiary to demonstrate payment of wages. In our previous decision we specifically requested IRS Forms W-2 of 1099 to demonstrate payment of wages to its other beneficiaries. The Petitioner cannot meet the burden of proof simply by claiming a fact to be true without supporting documentary evidence. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)); and *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The Petitioner must, therefore, establish that it had the ability to pay wages of \$107,951.41 in 2014 and \$108,054.34 in 2015.

## C. Net Income and Net Current Assets

In our decision we noted that the Petitioner only submitted a copy of the first page of its 2014 Internal Revenue Service (IRS) Form 1120S, U.S. Income Tax Return for and S Corporation, rendering us unable to determine its net current assets or whether it had additional income credits, deductions, or other adjustments shown on its Schedule K affecting its 2014 net income. We therefore determined that the Petitioner did not submit evidence that it had sufficient net income or net current assets to pay the difference between the proffered wage and the actual wages paid for the instant Beneficiary and the beneficiary of its other immigrant petition.

On motion, the Petitioner submits a Profit and Loss/Balance Sheet Information Request and Financial Accountants Work Programme: Investigations Information Request. The Petitioner presents the data contained in these reports to establish its ability to pay both of its beneficiaries in the context of its net current assets (working capital). However, the financial reports are unaudited and it is unclear whether they were performed under U.S. generally accepted principals of accounting as they were compiled by the Petitioner for use by a company based in the United Kingdom. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no

accountant's report accompanying these statements, we cannot conclude that they are audited statements. Unaudited financial statements are the representations of management and are insufficient to demonstrate the ability to pay the proffered wage.

The Petitioner also submits full copies of its 2013 and 2014 tax returns. The Petitioner's 2014 tax return indicates that it had \$79,319 in net income and \$68,762 in net current assets. The Petitioner cites its 2014 net income as in excess of \$200,000. However, the Petitioner refers to its accumulated earnings and profits on Page 2 of the Form 1120S, rather than its net income, which is found on line 18 of Schedule K. The Petitioner did not submit regulatory prescribed evidence of its ability to pay the proffered wages in 2015. Accordingly, the Petitioner did not submit evidence that it had sufficient net income or net current assets to pay the difference between the proffered wage and the actual wages paid for the instant Beneficiary and the beneficiary of the other immigrant petition from the priority date onwards.

D. Totality of the Circumstances

USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

On motion, the Petitioner states that, given its 37 years in business, its established growth with low liabilities, the overall number of employees, its reputation within the industry and the minimal shortfall between the proffered wage and the actual wages paid to the Beneficiary, its job offer is realistic and it possesses the financial ability to pay the wage offered.

The Petitioner claims that it employed 52 workers on the Form I-140. However, the Petitioner's quarterly wage reports indicate that it employed 36 workers in 2014. While the Petitioner has been in business since 1979, its 2013 and 2014 tax returns show that its gross receipts have decreased by more than \$1 million. As the record includes only two of the Petitioner's tax returns, it does not contain sufficient evidence to support the Petitioner's assertions regarding its historical growth or reputation within the industry. These assertions, unsubstantiated by supporting evidence, are insufficient to satisfy the Petitioner's burden of proof. Further, despite having the opportunity to submit additional evidence below and on motion, the Petitioner did not submit evidence of its payment of wages to the other beneficiary in all relevant years.

For the above reasons, the Petitioner has not established its ability to pay the proffered wage.

## II. CONCLUSION

In summary, the Petitioner did not establish that it has the ability to pay the proffered wage from the priority date onwards. Our previous decision is affirmed and the petition remains denied.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966); *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

**ORDER:** The motion to reopen is denied.

**FURTHER ORDER:** The motion to reconsider is denied.

Cite as *Matter of G-P-&A-, Inc.*, ID# 17793 (AAO June 30, 2016)